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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1941.

No. ~~980~~ 30

LAWRASON RIGGS, JR., Special Guardian,
Petitioner,

against

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD W. HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,
Respondents.

PETITION AMICUS CURIAE OF ATTORNEY GENERAL OF NEW YORK STATE IN SUPPORT OF WRIT OF CERTIORARI.

JOHN J. BENNETT, JR.,
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Capitol, Albany, N. Y.

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Solicitor General,
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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of New York, by your petitioner, as Attorney General, respectfully urges a favorable consideration of the petition for writ of certiorari in the above case, now pending before this Honorable Court

Under the New York Constitution, the Attorney General is the head of the Department of Law and, under the State Executive Law (§ 68) whenever the constitutionality of a New York statute is brought into question in the New York courts and an appropriate order is made, he is charged with the duty to appear therein in support of the constitutionality of such statute.

Appellants brought this case from the Surrogate's Court to the Court of Appeals of the State by direct appeal pursuant to Article VI, sec. 7, subdiv. 3, of the New York Constitution and supplemental statute (Civil Practice Act, § 588 subd. 3), which provide that a direct appeal may be taken where the only question involved is the Constitutional question, and that the Court of Appeals on such appeal shall consider and determine only the Constitutional question. It is therefore quite indisputable that the Constitutional question was necessarily involved (See Remittitur of Court of Appeals and denial of motion to amend same).

The Question Presented by the Appeal.

The appeal presents the single question—whether a New York statute, Decedent Estate Law, sec. 124 is unconstitutional as repugnant to the Federal Estate Tax Act and as violating the supremacy or uniformity clauses of the Federal Constitution.

The majority of the Court of Appeals construed the Federal Estate Tax Law, and Section 826(b) of the Internal Revenue Code in particular, as placing the ultimate incidence of the tax upon the net *residuary* estate. It then determined that the New York statute which required, in the absence of a provision in the will directing otherwise, proration of the amount of the federal tax was repugnant to the Federal Estate Tax Law and to so much of Section 8, Article VI, of the Federal Constitution as provides that the laws of the United States shall be the supreme law of the land.

The majority also held that even though Congress may have failed to fix the incidence of the tax completely, a state may not constitutionally supplement such omissions in the federal act.

The court determined that there could be no uniform operation of the federal estate tax if each state determined for itself how the burden of the tax should be borne, and for this reason held Section 124 of the Decedent Estate Law to be repugnant to so much of Article I of the Federal Constitution as provides that federal excises shall be uniform throughout the United States.

The Federal Estate Tax Act imposes an excise tax on the interest of a decedent which passes by reason of his death. Congress, by that Act, has laid the tax and has provided that it shall be collected from "the executor," that is to say, from a State fiduciary rather than from any of the parties beneficially interested. Section 124 of the New York statute provides that, whenever it appears upon any accounting or other proceeding, an Executor "has paid" the Federal Estate Tax, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated—that is to say, by the State fiduciary on his accounting, subject to the approval of the court, among the persons actually interested in the Estate to whom any benefit accrues. Such right and power springs from a State's control over testamentary dispositions as well as from its control of its fiduciaries.

This question would appear to be one of nation-wide importance, affecting the right of each State, through its Judiciary, in the absence of a statute, to deal with the incidence of the Federal estate tax after the State fiduciary "has paid" the tax and obtained his duly-receipted tax bill, and, in case of a State statute, the right and power of State Legislatures to enact such an act dealing with such incidence.

The History of §124, Decedent Estate Law.

Section 124 was drawn by two State Commissions acting together, the State Tax Commission and the Decedent Estate Commission. The latter Commission was created in 1927 to investigate defects in the Laws of Estates. Its work continued for a period of several years and resulted in a complete modernization of the New York statutes relating to descent and distribution and the administration and taxation of estates.

In 1929 these two Commissions undertook to reform the State laws to take advantage of the federal system as to over-all rates and prompt collection of the tax from a fiduciary, to provide for judicial supervision of the fiduciary upon his accounting, to enunciate a State public policy that the burden of Federal and State death taxes should follow the benefit, and to give the bar two similar tax acts with similar form of returns, leading to similar hearings, with the result that a determination upon almost any point by the Federal or State Tax Departments would become helpful upon a determination of similar points by the other Department. These Commissions spent a large amount of time and care on this revision, and in 1930 presented their proposal to the Legislature. Section 124 was not an isolated Act. The Commissions separated their proposals into three companion bills which the Legislature adopted as Chapters 709, 710 and 711 of the Laws of 1930. Chapter 709 dealt with the apportionment of the Federal Estate Tax, Chapter 710 set forth a new State tax law, and Chapter 711 provided for composition of taxes over-paid on closed Estates. All three were signed and approved by Governor Roosevelt.

This legislation, accomplished by two outstanding State bodies, has worked satisfactorily, fairly and equitably from

1930 to 1941, and, from time to time, has had the approval of the Court of Appeals (*Matter of Duryea*, 277 N. Y. 310, 316; *Matter of Vanderbilt*, 281 N. Y. 297, 316). Referring specifically to Chapter 709 (now D. E. L. sec. 124), many citizens of New York, from 1930 to 1941 have made wills relying on Section 124. The members of the Commissions were probably the most experienced group in the State who conceivably could have been appointed to carry on the work. The members of the Decedent Estate Commission included the Surrogates in the four most populous Counties in the State who were constantly dealing with tax questions in connection with estates, James A. Foley, of New York, Chairman, the late Louis B. Hart, of Buffalo, the late George A. Slater, of Westchester, and General George A. Wingate, of Kings; members of the Legislature, including Edmund B. Jenks, George R. Fearon and Samuel Mandelbaum, later District Judge, and lawyers appointed by Governor Alfred E. Smith, including John G. Saxe, Esq., later President of the New York State Bar Association.

The Commissions when they drew the Act in 1929 had before them among other factual data the opinion of the Circuit Court of Appeals in *Edwards v. Slocum* (287 Fed. 651, affirmed, 264 U. S. 61). On the appeal to the Supreme Court distinguished counsel for the Government representing the Department of Justice and the Treasury Department expressly accepted and restated the following as "fundamental and conceded" propositions stated by Judge Hough in the Circuit Court of Appeals:

> "So far as the words of this statute are concerned, the United States does not care who ultimately bears the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the State courts can settle the matter."

In particular the commissions had before them Section 303(a) (3) of the Revenue Act of 1924, where the Congress *expressly* confirmed the same position as to the Estate Tax Act itself.

It is this Section 124, approved by the Courts for eleven years which the Court of Appeals of New York has now suddenly and unexpectedly by a vote of four to three held to be invalid as repugnant to the Federal Estate Tax Law and as violation of the supremacy and uniformity clauses of the Federal Constitution. And in so doing the Court of Appeals adopted a construction of the Federal statute leading to absurd harsh and unnecessary results in disregard of this Court's settled principles of statutory construction.

The Statute is not unconstitutional as repugnant to the Federal Estate Tax Law.

Alexander Hamilton pointed out in "The Federalist" (No. 32):

> "* * * it is not a mere *possibility* of inconvenience in the exercise of powers but an *immediate, constitutional* repugnancy which can by implication alienate and extinguish a pre-existing right of sovereignty." (Emphasis supplied.)

Hamilton was discussing the possibility of inconvenience in the exercise by Federal and State Governments to their concurrent power to levy and collect taxes.

The asserted repugnancy in the present case is infinitely more remote. The power conferred on the Congress is "to lay" and "to collect" (U. S. Constitution, Article I, sec. 8), and in this case the asserted repugnancy is between a Federal statute laying an excise tax on a gross estate (including transfers by will, transfers by deed, estates in survivorship, tenancies in common and what not), and a State stat-

ute, which, by its very terms, becomes applicable only after the Federal Government has laid and collected the tax, and a state fiduciary of the State "has paid" it. It is then and then only that the State statute authorizes the appropriate state courts to make sure that its own fiduciary, in his accounting as to his acts as fiduciary, shall show that he has done justice in marshalling his payments, so that, so far as possible, the burden will follow the benefit.

This Court has said—and the principle has often been reaffirmed—"* * * repugnancy or conflict should be *direct* and *positive*, so that the two Acts *could not be reconciled or consistently* stand together." *Reid v. Colorado*, 187 U. S. 137, 148; *Sinnot v. Davenport*, 22 How. 227, 243.

§124 is not repugnant to the supremacy or uniformity clauses of the Federal Constitution.

The requirement in the United States Constitution that Federal excise taxes shall be uniform throughout the United States is not a proper ground for holding state statutes unconstitutional, *Peacock v. Pratt*, 121 Fed. 772. And the Federal statute construed so as to permit the states to determine the final incidence of tax would not infringe upon the constitutional prohibitions against delegation of the taxing power or the requirement of geographical uniformity. *Phillips v. Commissioner*, 283 U. S. 589, 602.

Section 124 as applied to the estate of Josephine Del Drago is valid as imposing a condition of her will-making privilege in respect of the final incidence of this tax expressly left to her will by the Federal Estate Tax Law.

Whatever meaning is placed upon Section 826(b) of the Internal Revenue Code it specifically leaves the determination of the incidence of the tax to testator's will. A will can have no force or meaning except as it is construed,

regulated and affected by applicable state law upon which it depends for its existence. *Irving Trust Co. v. Day*, ... U. S. ..., January 5, 1942; *Matter of Bergdoff*, 206 N. Y. 309, 316.

Consequently by necessary implication Congress has left unimpaired the authority of the states to determine the final incidence of the tax already paid to it through their power to impose a condition on the will-making privilege. The Federal statutes (Sec. 812(d), Sec. 826,(b), (c)) would seem to empower the decedent to do by will what the State of New York, having jurisdiction of distribution, as well as of original probate of the will, is by this decision denied authority to direct by legislative act. The power of the State is at least equal to the influence of the "dead hand" in the application and construction of Federal statutes.

WHEREFORE, the undersigned, as Attorney General of New York State, respectfully prays that the petition herein be granted, and that he, as such Attorney General, be permitted to intervene and to participate in the argument.

Albany, New York, February 17th, 1942.

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HENRY EPSTEIN,
Solicitor General,
Of Counsel.